VOLUME 52

Abstract

(96)

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

(52 I.A.2d 46)

A

Gen. No. 10553

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

DENNIS OVERMAN,
Defendant-Appellee.

Appeal from the
Circuit Court of
Champaign County.

CROW, P. J.

The defendant, Dennis Overman, was indicted by the Grand Jury of Champaign County, on the 10th day of December, 1963, for the offense of perjury. The indictment contained four counts, all relating to his testimony in a previous trial of a burglary case entitled PEOPLE v. DENNIS OVERMAN and FLOYD MINGEE, No. 8660, in the same Court, where the defendant Overman had been called to testify as a Court's witness apparently at the instance of the People. A motion to quash the indictment for perjury was filed by the defendant. The Circuit Court on the 12th day of February, 1964, granted the defendant's motion and ordered the indictment quashed and the defendant released and discharged. The People prosecute this appeal.

The indictment is in four counts. Count I alleged in substance that the defendant committed perjury in that while under oath and called as the Court's witness in PEOPLE v. DENNIS OVERMAN AND FLOYD MINGEE, No. 8660, where an oath was required, he made false statements material to the issue, in that he testified falsely on certain matters affecting his credibility as a witness, in that he denied past statements, contradictory to his testimony at the trial, made to David Gentille and Lloyd Biles relating to the commission of a burglary by Overman and Mingee which was then the subject of the cause being tried, Overman knowing his testimony denying the prior statements to Gentille and Bales was not true. Count II was similar, charging (or being evidently intended to charge) the defendant with falsely testifying "No" in answer to a question "Dennis, at that time and place you were talking with Gentille, did you admit to Detective Gentille you broke into Wandell's?", which was material to the issue of the credibility of Overman. Count III was also similar, charging the defendant with falsely testifying "No, I didn't, no" in answer to a question "Dennis, were you asked this question at that same time and place: Dennis, how many burglaries can you recall that was reported on a regular complaint at the Police Department that you read the following day and you know you pulled it? And did you give this answer: I know of Wandell. I know that. Did you give that answer?", which was material to the issue of the credibility of Overman.

Count IV, for example, was, in full as follows: " * * That Dennis Overman late of said County, on the 22nd day of October, 1963, at and within the said County of Champaign, and State of Illinois, aforesaid, committed the offense of perjury in that he, being then and there under oath in a proceeding whereby law such oath was required, said proceeding being to-wit: The trial of the case entitled People of the State of Illinois, plaintiff, vs. Dennis Overman and Floyd Mingee, defendants, Criminal Case No. 8660 in the Circuit Court of Champaign County, State of Illinois; said proceeding then and there on trial in said Circuit Court before a jury impaneled and sworn to try the issues and said proceeding relating to the commission by said Dennis Overman and Floyd Mingee of a Burglary of a certain building, to-wit: Wandell's Garden Center, a building belonging to Twin City Nursery, Inc., a corporation, which burglary was the subject matter of the cause being tried in the said Circuit Court on the said date, then and there testifying in open court during said trial on matters material to the proceeding aforesaid said Dennis Overman in answer to question, to-wit: At that said time and place were you asked this question:

'Q. Did you or Mingee take money?' And did you answer:

'A. Yes. Myself and Officer Mingee took $45.00 in cash and split it up.' Were you asked that question at that time and place by Detective Gentille, and did you make that answer?; the said Dennis Overman then and there made a false statement, to-wit:

"No"; which said false statement was then and there material to the issue of the credibility of the said Dennis Overman, the said Dennis Overman then and there testifying as aforesaid to matters material to the proceeding aforesaid, as a witness called by the Court in the proceeding aforesaid, and the said Dennis Overman then and there made false statement which he did not believe to be true, contrary to Section 32-2 of the Criminal Code of 1961, and Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois."

It is the People's theory that an indictment for perjury which charges the defendant (when testifying as a Court's witness) with testifying falsely in denying past admissions relating to the premises burglarized, when coupled with an allegation that such false testimony is material in that it affects defendant's credibility as a witness, and an allegation of the falsity of a material matter, is a complete statement of the offense and adequately apprises the defendant of the nature of the charge. It is the defendant's theory that the People could not impeach, let alone charge perjury, on a prior inconsistent unsworn statement or admission of this defendant which was incompetent and immaterial as to Floyd Mingee who was the only defendant on trial in the prior cause No. 8660. The defendant's motion to quash, briefly, set forth as grounds that Overman was not a party to the prior case, No. 8660, when he was called as a witness and his statements were

immaterial to the issue of that cause; Count I consists entirely of conclusions; the purported testimony was incompetent and immaterial and not a basis for perjury or impeachment of credibility; the People had granted Overman immunity in testifying; the indictment does not allege the defendant gave prior contradictory statements under oath; Count I does not set forth any alleged false testimony; and the indictment does not allege that any of the defendant's testimony under cross examination was germane to any testimony elicited on direct examination and hence such cannot be the basis of perjury.

Although both the People and the defendant have interjected in their briefs here certain statements said to be factual matters, some of these statements are, necessarily, not in the record and we can take cognizance only of matters appearing in the record. The cause is before us only on the indictment and the motion to quash. The indictment clearly states that Dennis Overman and Floyd Mingee were tried before a jury for the crime of burglary of a certain building in Cause No. 8660 in the Circuit Court of Champaign County, that during the trial the defendant, Dennis Overman, was (in some manner unexplained in the indictment, or briefs) called as a Court's witness and then made certain allegedly false statements evidently while under cross examination by the People which he did not believe to be true, contrary to the Criminal Code of 1961, Section 32-2. We assume that the Trial Court considered only what was alleged in the indictment when it

passed on the Motion to Quash. We are necessarily required to do the same.

The Constitution of Illinois, Article II, Section 10, provides: "No person shall be compelled in any criminal case to give evidence against himself, * * * ". A witness cannot be impeached on a matter as to which he could not have been required to testify: Cf. PEOPLE v. PFANSCHMIDT (1914) 262 Ill. 411.

As it appears that Dennis Overman was called in the prior case as the Court's witness and subjected to cross examination apparently by the People in that case where he was being tried along with Floyd Mingee, and was interrogated on a matter he could not, under the Constitution, be required to testify on, we agree with the Trial Court that the Motion to Quash should have been allowed. The particular allegedly false statements could not, under the circumstances, have been perjury. It may also be observed that although in a proper case a witness may be impeached by showing that he has made contradictory statements he cannot thus be impeached as to collateral matters: PEOPLE v. PFANSCHMIDT, supra; PEOPLE v. JOHNSON et al. (1929) 333 Ill. 469; and while in a proper case perjury may be assigned on the cross examination of a witness, that is upon the theory that where the testimony in chief is material to the issue and the cross examination affects the credibility of the witness the cross examination may then become material: WILKINSON v. PEOPLE (1907) 226 Ill. 135, - but here, from all that appears in the record, the defendant Overman

had not testified in chief on direct examination in the prior case at all, but only as upon cross examination when called as a Court's witness at the instance evidently of the People.

We, therefore, find no error in the judgment, and it will be affirmed.

A F F I R M E D .

SPIVEY and SMITH, JJ., concur.

APPELLATE COURT NO. 64-36. AGENDA NO. 54.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

ROBERT J. MARINKO and EMMA L. MARINKO,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of
vs.	)	Madison County, Illinois.
LAMOINE D. BROWN, d/b/a BROWN TRACTOR SALES, and LAMOINE D. BROWN, as an individual,	)	
Defendants-Appellees.	)	Honorable Harold R. Clark, Judge Presiding.

REYNOLDS, J.

Plaintiffs filed their four count complaint against the defendants in the Circuit Court of Madison County. Count 3 of the complaint charged that the plaintiffs executed and delivered to the defendants their certain negotiable instruments which were executed and delivered to the defendant as part of the purchase of a corn picker from the defendant; that defendant verbally guaranteed the picker to be in excellent mechanical condition; that defendant further guaranteed to take the picker back and release the plaintiffs from any balance owed on the picker, as of

the date of repossession; that the picker broke down and defendant sent repair men to the plaintiff's farm in Madison County; that after the repairs it again broke down and was again repaired; that it continued to break down and be repaired by the defendant or his agents, until the plaintiffs took the machine back to the defendant and left it on his machinery storage lot. Plaintiffs claim the defendant refused or failed to return to them their negotiable paper or relieve them of liability for the balance owed, as he had promised to do; and as a consequence The Bradford National Bank of Greenville, Illinois, took judgment against plaintiffs on said negotiable paper which judgment the plaintiffs satisfied. Plaintiff Robert J. Marinko claimed as damages $4000.00 for loss of a corn crop, $900.00 for satisfaction of the judgment of The Bradford National Bank, damage to their credit standing in the community of $3000.00, $3000.00 for damage to the farm, or a total of $10,900.00. In Count II Robert J. Marinko claimed damages of $10,000.00 as punitive damages based upon alleged wilful and wanton misconduct on the part of the defendant. Count III alleged damages of Emma L. Marinko of $900.00 for the judgment of The Bradford National Bank, and $3000.00 for damaged credit standing in the community. Count IV claims punitive damages to Emma L. Marinko in the amount of $10,000.00.

The complaint was not verified.

Thereafter, defendant filed his motion to transfer the cause to the Circuit Court of Bond County, Illinois, and for grounds alleged that defendant's place of residence is now, and was at all times mentioned in the complaint herein, in the County of Bond, State of Illinois. That neither the transaction, or any part thereof out of which the alleged cause of action arose, occurred in the County of Madison, State of Illinois. The motion was verified by the affidavit of Lamoine D. Brown, who stated that his place of residence has always been in the Town of Central, Bond County, Illinois, his place of business in Central Township, just outside of the City Limits of Greenville, Bond County, Illinois. Affiant further stated that plaintiff Robert J. Marinko came to defendant's place of business for the purchase of the tractor and corn picker referred to in the complaint, that the payment note was made and delivered to him at his place of business in Bond County, and that the preliminary arrangements for the execution of the note and contract took place at The Bradford National Bank of Greenville, in Bond County, Illinois. Affiant further stated that the sale and purchase of the tractor and corn picker and all discussions and transactions in reference thereto were had at his place of business and at The Bradford National Bank of Greenville, Illinois, both in Bond County, and that no

part of the transaction for the sale and purchase took place in Madison County, Illinois. This affidavit was filed by the defendant on September 23, 1963, and copy of motion to transfer was served upon counsel for plaintiffs on the same day. The plaintiffs filed no counter motions or affidavits, and did not submit any evidence at the hearing on the motion which was held February 20, 1964. The court allowed the motion and ordered the cause to be transferred to the Circuit Court of Bond County, Illinois. It was further ordered that the costs attending the transfer should be paid by the plaintiffs. From that order the plaintiffs appeal to this court.

The sole question at issue here is venue. The Practice Act was amended July 19, 1955, effective January 1, 1956. Section 5, Chapter 110, Illinois Revised Statutes, provides:

> "5. Venue-Generally. Except as otherwise provided in this Act, every action must be commenced (a) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him and not solely for the purpose of fixing venue in that county, or (b) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. If all defendants are nonresidents of the State, an action may be commenced in any county."

Sub-paragraph (3) of Section 8, Chapter 110, Illinois Revised Statutes, provides:-

> "Motions for transfer to a proper venue may be supported and opposed by affidavit. In determining issues of fact raised by affidavits, any competent evidence adduced by the parties shall also be considered. The determination of any issue of fact in connection with a motion to transfer does not constitute a determination of the merits of the case or any aspect thereof."

As stated, the only issue raised on this appeal is venue. The only evidence as to venue is the affidavit of the defendant, which says he is a resident of Bond County, his business is in Bond County, and that all dealings and transactions between himself and the plaintiffs took place in Bond County and that no part of the transaction took place in Madison County. There is no evidence to the contrary, either by affidavit or otherwise.

On the record, this court must affirm the order of the Circuit Court of Madison County.

Affirmed.

DOVE, P. J. and WRIGHT, J., Concur.

PUBLISH IN ABSTRACT ONLY.

49594

52 I.A.2d 277

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. JAMES JOHNSON, Plaintiff in Error.	WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On a trial by the court without a jury, the appellant James Johnson and his codefendants Arthur Clark and Harry Boyd were found guilty of burglary. Johnson was sentenced to the penitentiary for a term of three to seven years. Clark's conviction was affirmed on appeal (People v. Clark, 30 Ill. 2d 216, 195 N.E.2d 631). The principal issue on this appeal is whether Johnson was proved guilty beyond a reasonable doubt.

During the early morning hours of October 31, 1961, a Chicago police officer, Edward Wodnicki, discovered that a panel had been drilled out and replaced in a garage door at the rear of 1420 South Michigan Avenue. The Ethyl Corporation occupied the first floor of the premises and the N.E.C. Radio Corporation occupied the second floor. Directly across the alley behind two garbage cans the officer discovered an axe, a brace and a bit and he also saw an unoccupied Ford car parked nearby. His suspicions aroused, he concealed himself behind the garbage cans and maintained a surveillance from about 3:30 a.m. to 3:55 a.m., when he walked to a nearby restaurant and telephoned for assistance. That took about five minutes. He returned to the alley and was soon joined by two detectives who set up a floodlight (unlighted)

directed at the garage door. About 4:45 a.m. the drilled panel was kicked out from the inside, after which Clark emerged taking some packages that were handed to him through the door. He walked to the Ford, placed the packages inside, and returned to the garage. After that had been repeated twice, two men, James Johnson and Harry Boyd, emerged through the panel opening and all three picked up some packages and started for the car. At that point the police turned on the floodlight and placed the three under arrest.

According to Wodnicki, Johnson admitted that the brace and bit had been used to drill out the panel and that the axe had been used to knock out the plaster in a stairwell. A search of Johnson's person produced a paring knife and a screw driver, while Boyd was found to have a paper upon which were written the words "N.E.C. Radio Corporation." Some 58 packages were recovered by the officers either in the car, in the hands of the men, or just inside the garage door, and all but one, which contained radio parts, were found to contain transistor radios. All three men gave fictitious addresses.

Chris Marinic testified for the corporation that he was secretary of the N.E.C. Radio Corporation, which occupied the second floor of the premises and that when he was summoned by the police at about 4:00 a.m., he found a hole in the wall in the rear of the building, in the premises of another corporation, and that the wall between those premises and the second floor premises of the N.E.C. Corporation had been

broken open half-way between the first and second floors, and that he found empty boxes and cartons scattered about in the N.E.C. office. On the basis of an inventory taken 14 days prior to the burglary it was ascertained that 460 radios, 5 cameras and a box of radio parts were missing. Of these items, only the box of spare parts and 57 radios were ever recovered.

According to Johnson and his two companions, they had spent the evening drinking and had bought a bottle of gin. After that they drove into the alley and parked to drink it. While so engaged they purportedly saw two men walking down the alley with packages in their hands. A short time later Clark left the car to relieve himself and discovered some packages piled up in the alley outside the garage. He found they contained radios and returned to the car to tell Johnson and Boyd of his discovery, whereupon all three went to the spot where the packages were stacked and were arrested. They denied they had been in the building.

The defendant argues on appeal that the state's whole case on breaking and entering the building is based upon circumstantial evidence and that there is no direct evidence to indicate he entered the premises of the N.E.C. Radio Corporation. The state's line of inference, defendant contends, must be that defendant and his companions entered through the panel at the rear of 1420 South Michigan Avenue, broke through to the stairwell leading to the second floor premises of N.E.C., stole the radios and spare parts, and brought them back through the Ethyl Corporation premises to the outside via the drilled out panel. An equally reasonable inference

from the circumstantial evidence, defendant contends, is that the two persons who defendant and his companions testified they saw going down the alley carrying boxes had previously broken and entered the Ethyl Corporation premises and from there had entered the N.E.C. Radio Corporation premises through the stairwell; that they had already removed most of the radios and had stacked the balance around the drilled out panel entrance to the Ethyl Corporation. Defendant's argument is that all he and his codefendants did was to subsequently pick up part of the radios from in and about the panel entrance. He contends he cannot be convicted of breaking and entering the N.E.C. Radio Corporation's premises with intent to commit a felony, since the proof establishes at most a breaking and entering of the Ethyl Corporation premises; that entry of the Ethyl premises could not have been accompanied by intent to commit a felony because the property of the N.E.C. Radio Corporation had already been stolen from the latter's premises and abandoned on the Ethyl premises by previous entrants of the building. He contends further that even if removal by defendant of the boxes on Ethyl's premises could be deemed to constitute a felony, the gist of the offense charged in the indictment is entering the premises of N.E.C. Radio Corporation, and proof that defendant committed some other crime in some other premises would be a fatal variance. I.L.P. Indictments & Information, § 113; People v. Day, 321 Ill. 552, 152 N.E. 495.

While defendant's theory is ingenious, it rests entirely upon the testimony of Johnson and his codefendants with respect to the two men and whether the trial court believed their

story. Here the words of the Supreme Court in the Clark case, supra, are applicable (p. 219):

> "Where the cause is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony, and where the evidence is merely conflicting a reviewing court will not substitute its judgment for that of the trier of fact, (People v. McCreary, 29 Ill. 2d 295; People v. Dillon, 24 Ill. 2d 122.) Here, there was credible evidence fully establishing defendant's guilt of the crime charged and, what is more, the trial court could properly consider the improbabilities in defendant's explanation of his presence at the scene of the offense, and of the manner of discovery of the stolen goods. (Cf. People v. Oswald, 26 Ill. 2d 567; People v. Spagnolia, 21 Ill. 2d 455.) Nor does the fact of the missing radios and cameras serve to create a reasonable doubt of guilt. The gist of the offense of burglary is the entering of a building with a felonious intent, (People v. Palmer, 26 Ill. 2d 464; People v. Maffioli, 406 Ill. 315,) and the crime is complete whether or not anything is taken, (People v. Figgers, 23 Ill. 2d 516; People v. Dennis, 28 Ill. 2d 525,) or whether or not items taken in the burglary are recovered. (People v. Oswald, 26 Ill. 2d 567.)"

Defendant has made no argument to rebut the existence of the scrap of paper with the words "N.E.C. Radio Corp." written on it found in Boyd's pocket, and in addition there is Johnson's admission to Wodnicki to support the judgment of the trial court. It was proved beyond a reasonable doubt that defendant broke and entered the building with a felonious intent.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

Abstract only.

A

49333

52 I.A.2 320

ANNA MILLER,

Plaintiff-Appellee,

v.

JOSEPH SINGER, d/b/a SINGER SHOE STORE,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Plaintiff brought suit against defendant for personal injuries alleged to have been sustained when she stumbled and fell over a fitting stool while a customer in defendant's shoe store.

At the close of plaintiff's case, as well as at the close of all the evidence, defendant moved for a directed verdict. Both motions were denied. When plaintiff moved for a directed verdict at the close of all the evidence, the court reserved its ruling. The case was submitted to the jury, but after four hours of deliberation they were recalled, and, over defendant's objections, the court directed the jury to find in favor of plaintiff on the question of liability and to retire to determine the amount of damages. The jury returned a verdict as directed and assessed plaintiff's damages at $15,000.00. Judgment was entered on the verdict. Defendant filed a post-trial motion for judgment notwithstanding the verdict or, alternatively, for a new trial. Both motions were denied, and this appeal followed.

The factual witnesses were defendant who was called as an adverse witness by plaintiff, and plaintiff who testified in her own behalf. The accident occurred about 9:30 or 10:00 p.m. on January 5, 1956 in defendant's shoe store at 4016 West 26th Street, Chicago. The floor was covered with wall-to-wall gray carpeting. There was a set of standard shoe chairs in the center of the store. A shoe chair is mounted on chrome legs, has padded lateral supports,

and a foam-cushioned seat. Used in connection with the chair was a fitting stool which had a cushioned seat and a slanted portion upon which the customer placed his foot for fitting. When not in use the slanted portion could be pushed under the customer chair; the remainder of the fitting stool with the cushioned seat extended beyond the chair. The store was equipped with fluorescent lights; there is no complaint that it was not well lighted. Plaintiff was wearing a winter coat and carried a shopping bag and a purse. She wore glasses (not bifocals) and described herself as a heavy-set woman. She admitted that she had been in the store a number of times during the twenty or so years that it had been in the neighborhood, and that she had seen the salesmen use similar stools when fitting her with shoes on previous shopping excursions.

There is a conflict in the testimony as to whether plaintiff sat in one of the chairs, as defendant testified, or remained standing in front of the third or fourth customer chair, as she testified. She asked to see a pair of slippers. Having selected the pair she wished to purchase, she paid the salesman. He put the money in the register, packaged the slippers, and brought them over to her. As she turned to walk out of the store she tripped and fell over the cushioned portion of a stool which had been put under a vacant customer chair. She claims that she did not see the stool until after she fell over it.

Defendant contends that: (1) the trial court erred in denying his motion for a directed verdict and in denying his post-trial motion for judgment notwithstanding the verdict because under the facts in evidence he was not negligent, and plaintiff was guilty of contributory negligence as a matter of law; and (2) the trial court erred in directing a verdict in favor of plaintiff and

in denying defendant's post-trial motion for a new trial because under the facts the questions as to defendant's negligence and plaintiff's contributory negligence were jury questions and not questions of law.

We agree with defendant's second contention. Under the well established rule, negligence and contributory negligence are questions of fact for the jury. The judge is not justified in weighing the evidence; that is the function of the jury where the evidence is conflicting. Genck v. McGeath, 9 Ill. App.2d 145, 132 N.E.2d 437 (1956); Cloudman v. Beffa, 7 Ill. App.2d 276, 129 N.E.2d 286 (1955).

Plaintiff claims that defendant's failure to keep the aisles and the store area generally clear of obstructions and hazards known to him to be there, and his further failure to apprise plaintiff of a footstool partially under a customer chair when he knew plaintiff might walk into it, constitute negligence in law. She also contends that her failure to look for hazards was not an omission of due care by her as a matter of law and that therefore she was not contributorily negligent. Upon the record presented and inferences to be drawn therefrom the jury could have reasonably arrived at different conclusions. If, as defendant testified, the fitting stool, which was cushioned in bright red and was clearly visible against the gray carpeting, was partially under the customer chair where, by its construction, it was intended to be, the jury may well have found that plaintiff was contributorily negligent in not seeing and avoiding it. The testimony presented a situation in which neither negligence nor contributory negligence became questions of law because not all reasonable men

might agree as to the facts. Wallis v. Villanti, 2 Ill. App.2d 446, 120 N.E.2d 76 (1954). By the same reasoning, the trial court did not err in denying defendant's motion for a directed verdict and in denying his post-trial motion for judgment notwithstanding the verdict.

Accordingly the judgment is reversed and the cause is remanded with directions to allow defendant's motion for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J., and BRYANT, J., concur.

A

49538

49539

52 I.A.2 321

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM SMITH (Impleaded) and EDWARD SMITH (Impleaded), Defendants-Appellants.	)	APPEAL FROM CRIMINAL COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

These consolidated cases arise out of indictments returned to the Criminal Court of Cook County charging defendants William Smith and Edward Smith with the offense of knowingly selling narcotic drugs to Donald Dura otherwise than as authorized by the Illinois Uniform Narcotic Drug Act (Ill. Rev. Stat. 1963, ch. 38, §§ 22--1-22--49). Defendants were found guilty, as charged, by a jury and sentenced by the court for a term of not less than ten years nor more than fifteen years. This appeal followed.

In the early morning hours of August 28, 1962, Police Officer Donald Dura drove Salvatore Monte (a former addict and an occasional police informer) to Clark and Division Streets (a location in the Near North Side area of Chicago), where Monte claimed he would be approached for the purpose of making a sale of narcotics. About 3:00 a.m., while Monte was seated in a restaurant with a friend, Teddy Hall (also an addict and a police informer), defendants entered, and the four men began discussing the difficulty of obtaining narcotics. Defendants agreed to take the others to the South Side, where a purchase of narcotics could be made. However, Monte indicated that he was waiting for someone to supply the money with which to make the purchase. Locating Officer Dura in an unmarked police car, Monte brought the officer to defendants who agreed to arrange for the sale. Defendants, the officer, Monte, and Hall drove in Edward's car

to an alley near 33rd Street between Indiana and Michigan Avenues, where Edward parked. There is a conflict in the evidence as to the ensuing events. Defendants claim that upon arrival Edward and Hall got out of the car and walked up the alley, Edward whistling, and that shortly thereafter "Joe" appeared and gave Hall three five-dollar bags of heroin. Hall gave the supplier $14.00, Edward gave the supplier fifty cents, and Hall gave Edward one dollar for gas. Later, Hall gave the narcotics to Officer Dura. According to the officer, he gave Edward $15.00 in marked currency, whereupon Edward disappeared up the alley alone. Upon Edward's return to the car Monte took the wheel and drove the group north toward 11th and State Streets. Officer Dura asked Edward for the narcotics and was given three tin-foil packages containing the drugs. Officer Dura then placed defendants under arrest. Upon searching Edward one of the marked bills was found on his person. Edward claims that at no time did he have these three packages in his possession. William asserts that he was drunk that evening and had no idea what was going on around him.

As grounds for reversal it is first urged that the evidence failed to prove that the narcotics sold were opium. The police laboratory analyst testified that the substance sold by defendants was diacetylmorphine hydrochloride, commonly referred to as heroin; that it was not opium nor a derivative of opium; that by his definition of "derivative" the substance was not a derivative of opium because it was not derived from opium. Defendants argue that proof that the substance was not a derivative of opium or opium itself is sufficient to destroy the prosecution's case against defendants. This contention is based on the statutory definition of opium (Ill. Rev. Stat. 1963, ch. 38, § 22--2 (r) (4)): "'Opium' includes morphine, codeine, and heroin, and any compound, manufacture,

salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts." The unlawful sale of heroin, of itself and without any showing that the substance is opium or a derivative of opium, is sufficient to subject the seller to criminal penalties under the Uniform Narcotic Drug Act. The obvious intent of the statute is to prohibit the unlawful sale, not only of any compound, manufacture, salt, derivative, mixture, or preparation of opium, but also morphine, codeine, and heroin. Defendants have been charged with the unlawful sale of heroin, and the State proved that charge beyond a reasonable doubt. People v. Clark, 7 Ill.2d 163, 171, 130 N.E.2d 195 (1955).

The remaining ground for reversal is that the court admitted evidence of a prior criminal act, and defendants contend that the admission of this evidence constitutes prejudicial error. The State's attorney, during the presentation of the State's case, elicited evidence, over the objection of defense counsel, that defendant Edward had sold narcotics on a previous occasion to the State's witness. In a substantially identical case involving a conviction for unlawful sale of narcotics, People v. Cole, 29 Ill.2d 501, 194 N.E.2d 269 (1963), the court held that evidence of a prior sale of narcotics was admissible as relevant insofar as it tended to prove defendant's identity, guilty knowledge, design, or system. The court said (504-05):

> "Prior transactions between agent Cook and defendant strengthened the identification of defendant as the person with whom Cook dealt on October 10, and tended to remove any doubt that the defendant's conduct on October 10, if the jury believed Cook's version, was inadvertent or innocent. We think that it also showed the relationship between the parties and therefore explained Cook's account of the transaction of October 10. Considering the stealth with which narcotics transactions are conducted, it is not likely that agent Cook could have merely walked up to defendant, asked for a spoon of heroin, given him $120, gone to the Woods Lounge and had defendant give him the heroin. Yet this, in substance, is what the agent said.

> This account becomes plausible, however, when it is explained that on July 20 a special employee introduced Cook to defendant. These special employees of the police are generally users of narcotics and persons who know the sellers and are trusted by the sellers. Because of this introduction a sale was allegedly made on July 20, defendant making delivery by leaving the narcotics at a relay mail box. When no arrest was made for the transaction on July 20, this being a common practice of the police in order to locate the seller's source of supply, the next sale between Cook and defendant was made with less stealth on September 26, defendant making direct delivery to Cook whom he apparently trusted on the second occasion. These prior transactions explain and lend credence to the otherwise unrealistic ease with which the Federal agent managed the controlled sale on October 10."

But defendants claim that the testimony concerning the prior sale of narcotics, although it may have been admissible to show guilty knowledge, would be proper only in rebuttal, and certainly not in the State's case in chief. In the Cole case the court disposed of a similar contention by saying (504):

> "Defendant asserts that since he admitted being with agent Cook on October 10, his identity was not in issue and since he denied giving Cook a package or receiving money, his guilty knowledge was not in issue. This assertion overlooks the fact, however, that these were two elements to be proved by the People and there was no way of knowing what defense, if any, would be interposed. (See 2 Wigmore, Evidence, 3rd ed. sec. 307.) The People cannot be required to confine this evidence of prior transactions to rebuttal since there may be no rebuttal if defendant offers no evidence."

We have considered the other grounds urged for reversal but find them without merit.

The judgments of the Criminal Court are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

49593

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
CHARLES DiLELLA,
Defendant-Appellant.

APPEAL FROM

CRIMINAL COURT

COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a conviction following a jury trial in the Criminal Court of Cook County, Illinois, on September 20, 1963. The case was transferred to this court from the Supreme Court on April 1, 1964.

The appellant was convicted of theft of a tractor and trailer and was sentenced to a term of from five to ten years in the Illinois State Penetentiary. On this appeal the only complaint before the court is that the conduct of the prosecutor was such as to deprive the appellant of a fair trial.

The appellant was accused of stealing a tractor and a trailer and of driving it and the contents of the trailer - television sets and radios - to a warehouse managed by one Philip LaPalio. LaPalio and his wife were arrested at the same time as the defendant, though no charges were brought against them. LaPalio was the chief witness for the defense, testifying repeatedly that the defendant was not the man who drove the truck to the warehouse and helped unload the televisions and radios. The appellant's objections concern the manner in which the State sought to impeach this witness.

The principal point raised on the appeal is that the prosecutor asked LaPalio on cross examination whether or not he was arrested in connection with the crime for which the appellant was being tried. It is the settled rule in this state that the credibility of a witness may be attacked only by proof of a prior conviction of an

infamous crime, People v. Munday, 215 Ill. App. 356, aff'd 293 Ill. 191, 127 N.E. 364 (1919), People v. Parks, 321 Ill. 143, 151 N.E. 589 (1926), 37 I.L.P., Witnesses, § 183. In this case, however, the State did not raise the question of the witness' prior arrest for the purpose of attacking his over-all credibility, but for the purpose of showing that his testimony in this particular matter might be influenced by interest, bias or motive to testify falsely.

"A distinction must be made between proof of conviction of an infamous crime for the purpose of impeaching credibility of a witness and the use of arrest or indictment as evidence of bias or interest on the part of the witness." People v. Mason 28 Ill.2d 396, 400, 192 N.E.2d 835 (1963), 20 A.L.R.2d 1421, 1440. "Apart from accomplices and co-indictees, a witness in a criminal case, as well as in a civil case, may have motive to testify falsely about a particular matter. No useful purpose would be served in undertaking to enumerate even some of the innumerable motives that may exist. Suffice it to say that evidence of such motive tends to discredit the witness generally." 3 Wigmore, Evidence, Third Ed., § 697.

Here the State sought to show that LaPalio had such a motive to testify falsely. It is true that after the arrest of the witness the charges were dropped, but it is also true that nothing had occurred which would prevent the prosecution of the witness from being taken up again. Whether the witness had taken part in the crime is not for us to decide; the mere fact that the witness was obviously suspected by the State of participation in the crime is enough to permit the introduction of the arrest to show that he had a motive to give false testimony. Whether he was, in fact, lying was for the jury to determine.

The appellant objects to the following questioning of his witness, LaPalio: "Now Mr. LaPalio, do you know what a receiver is?"

Over defense objections, the court allowed the witness to answer and the prosecutor asked whether the witness knew what a "receiver of stolen property; a 'fence' was." The witness answered in the negative. When the defense counsel objected to the question, the assistant state's attorney said, "I am trying to show this man's interest." As noted above, this is perfectly proper for the State to do. The State cannot effectively show that the witness had a motive to testify falsely unless it can show what that motive might be. The motive in this case is that the witness was under suspicion of taking part in this theft in the role of a "fence." Since the fact of the arrest is admissible, it would seem that the reason for the arrest should also be admissible. Admitting only the fact of the arrest would seem to leave the jury up in the air as to the significance of that fact. Showing in what way the witness might have an interest in deceiving the court and the jury allows the trier of fact to weigh the probability of the witness not telling the truth with far greater accuracy. The rule must be, therefore, that where the State properly introduces the evidence of an arrest to impeach a witness for bias, interest or motive to testify falsely, the court in its discretion may permit the State to show how it connects the witness to the crime. Raper v. State, 4 So.2d 657 (1941). It is true that this may prejudice a criminal defendant, but the probative value of the evidence seems to far outweigh the possible harm done the appellant here. It is primarily for a trial court to protect the defendant from evidence more inflamatory than probative; the trial court has discretion in this matter. In this case we feel the trial court has not abused its discretion.

The appellant objects to the State's impeaching his witness, LaPalio, by asking him, "Were you present . . . when the police arrested your wife?" Assuming that the question was improper, the court said after objection, "Counsel's remarks may be stricken and the jury is

instructed to disregard them." We can only assume that the jury followed the court's instructions. The Supreme Court in People v. Hansen, 378 Ill. 491, 38 N.E.2d 738 (1942), held that where a court instructs a jury to disregard certain evidence, a court on appeal, absent special circumstances, will hold that the jury did follow instructions and that no prejudicial error took place. See also People v. Serevino, 359 Ill. 411, 194 N.E. 558 (1935). This must be the rule, for if the court indulged in the opposite assumption a jury trial would be an impossibility.

The appellant next contends that he was prejudiced by the evidence pertaining to a slip of paper found on the person of Mrs. LaPalio, not a witness in this proceeding, when she was searched at the police station after she was taken into custody. The prosecutor apparently was trying to show additional grounds for Mr. LaPalio to give biased or untrue testimony, to-wit: he would incriminate not only himself, but his wife as well. But while laying foundation for the introduction of the paper into evidence, the prosecutor learned from the witness on the stand, Policewoman Herb, that the paper had been altered since it was taken from Mrs. LaPalio. He, therefore, withdrew the exhibit, and the court said to the jury at this point, "I am going to strike from the record all testimony of Policewoman Herb and of this last officer, with reference to any papers that were found. You are instructed to disregard that testimony."

When instructing the jury, the Court said, "If in putting in the evidence or in argument, counsel for either party has made any statement not based upon evidence, or if counsel made any statement which he afterwards withdrew, or which the Court afterwards struck out, the jury should wholly disregard such statements." Due to these instructions by the Court below, we hold that the appellant was not prejudiced by the

introduction of these matters into the proceedings. People v. Hansen (supra), People v. Serevino (supra).

The appellant makes the final claim that the assistant state's attorney's final argument was so inflammatory that it denied him a fair trial. The assistant state's attorney said in part:

> "Examine their testimony (the police officers) in contrast to the gentlemen--and I use the term loosely--who took the stand for the defendant. He raised his right hand to God and he swore to tell the truth on each and every question. You heard the examination and the questions asked him; about three of them, about being in custody and so forth; each and every question that was propounded to him, the answers that he gave--and he realized he was under oath--he looked right in the face of God and he told an untruth. There is no question about it.
>
> "He has a lot to win or lose. His case was dismissed. But if he would have got on that stand and told you that, 'This is the man that did this' he would be indicted the day after tomorrow; because I would present evidence before the grand jury. This is the reason that he lied."

Normally such a statement in a closing argument would call for reversal. There is an exception, however, that where the defense attorney made reference to the witness' motive for telling the truth in closing argument, the State has a right to answer. The defense attorney opened the door to this strong closing argument by the assistant state's attorney with his own closing argument.

> "What interest does Mr. LaPalio have in the outcome of this case? . . . Why should he stick his neck out and tell a lie. . . . How is it going to hurt Mr. LaPalio to say, 'This is the man' if he was the man? What does he have to lose?"

Where the defense has made such a closing argument, the State has a right to tell the jury what the witness did have to lose. This harkens back to the witness' bias, interest or motive for not telling the truth. It is true that the State first introduced the witness' motive or interest into the case. The defense had a right to answer the State's theory on closing argument, but the State has a right to answer the defense's argument as well. People v. McElroy, 30 Ill.2d 286, 196 N.E.2d 651 (1964), People v. Brown, 30 Ill.2d 297, 196 N.E.2d 664 (1964).

We hold, therefore, that the conduct of the assistant state's attorney at the trial was not such as to deprive the appellant of a fair trial. Judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

49751

52 I.A.2 404

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EARL WILLIAMSON,
Defendant-Appellant.

APPEAL FROM
CRIMINAL COURT
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant, Earl Williamson, was arrested on April 2, 1961, and indicted on a charge of armed robbery. At his arraignment defendant's case was set for trial on July 7, 1961. On July 7, however, the judge to whom the case was assigned was on vacation and would not return until August 7. The judge who was hearing the vacationing judge's call on that day suggested that the parties wait until the vacationing judge returned because he had a large call and a jury trial would take time; this suggestion was based on the fact that the Four Term problem was not involved because a jury trial could have been had within the statutory period if the parties waited until the vacationing judge's return. Defendant then had a private conference with his attorney and upon their return counsel informed the court that defendant wanted to waive a jury trial if the case could be tried immediately. The court then admonished defendant that he had a right to be tried by a jury, but defendant himself stated that he would waive a jury and executed a jury waiver. Defendant was found guilty and sentenced to five to ten years in the penitentiary.

On Saturday, April 1, 1961, about 8:30 or 9:00 P.M., Mamie Lanier, the prosecuting witness, was walking to her mother's house after leaving a nearby movie theater. She testified that as she was passing a vacant lot in the 3800 block of Cottage Grove Avenue, Chicago, the defendant, who was in the lot, ordered her to stop. She stated that she stopped when she saw defendant holding a "long, silver-looking gun" in his hand. She called for help to a passerby, but that person

fled. Defendant ordered her into the lot and she walked part way in; defendant then grabbed her arm and pulled her further into the lot. She stated that he demanded her money and that she gave him $18 which she had. Mrs. Lanier testified that defendant then perpetrated a sordid, vile sex act upon her person and also threatened to make her undress and run down the alley naked. He dropped this demand and let her go after she pleaded with him and said that she would not go to the police. Mrs. Lanier then proceeded to a nearby tavern and asked the bartender if he could get someone to walk her home.

Upon arriving at the apartment building in which her mother lived a short while after the incident, Mrs. Lanier stated that she stopped on the second floor of the building and had a conversation with her aunt. After leaving her aunt, she was proceeding to the third floor where her mother lived, when she saw defendant standing up there. He called but she ran back downstairs to her aunt's apartment and called police; there was no response to this call.

On the following day, April 2, about 2:00 P.M., after Mrs. Lanier had fixed dinner for her aunt on the second floor, she was informed by her sister that a man, who turned out to be the defendant, was knocking on her mother's door asking for her by name. After he left, the police were again called and Mrs. Lanier waited for them outside the building. Officer Peter Santoro responded to the call and Mrs. Lanier gave him a description of the gun which defendant was carrying the night before. She entered the squad car and they toured the neighborhood for a short while, when they came upon the defendant in the 3800 block of Cottage Grove Avenue, a short distance from where the incident testified to by Mrs. Lanier had occurred. Defendant was ordered to stop, was searched and the gun which Mrs. Lanier had previously described to the officer was recovered, at which time he was placed under

arrest.

Mary Tomlin, Mrs. Lanier's mother, testified that defendant knocked on her door about 2:30 Sunday afternoon, asking for Mrs. Lanier by name. She stated that she would not open the door, that she asked who it was, and that defendant described himself as "Clifford." She told him that Mrs. Lanier was not there and to go away. As he proceeded downstairs Mrs. Tomlin opened the door and saw defendant descending the stairs. He turned, spoke to her, she told him to leave and he left. She next contacted Mrs. Lanier on the second floor and then called the police.

Officer Santoro testified that he responded to the call. He met Mrs. Lanier at the building where her mother lived and Mrs. Lanier gave him a description of the gun in question. The gun which was shown to him at trial was identified by the officer as the one recovered from defendant at the time of the arrest.

Defendant testified that he met Mrs. Lanier at about the same time and place as she said the incident occurred, but that he then asked her to have a drink with him at a nearby tavern, which offer she accepted; Mrs. Lanier denied this at trial. He further stated that he had known Mrs. Lanier for some time prior to this evening, having had drinks together on five or six prior occasions; this also was denied by Mrs. Lanier. A drinking friend of defendant, Willie Beverly, and another friend, Joseph Townsend, testified that there was a party in the tavern on the night in question and that defendant was there in the company of Mrs. Lanier, until about 9:30, at which time Mrs. Lanier left alone. They stated that defendant stayed in the tavern until about 10:00 or a little after.

Defendant admitted that he talked to Mrs. Tomlin Sunday afternoon, but stated that the reason he went there was to see if Mrs.

Lanier had arrived home safely the night before. He also stated that the reason he had the gun on his person when he was arrested was because he was going to pawn it with a friend of his for a few days. He stated that Mrs. Lanier could not have seen the gun prior to the time of the arrest because Sunday was the first time that he had it and he had not seen Mrs. Lanier on Sunday prior to the time of the arrest. He further stated that he gave his name as "Earl" when it was requested by Mrs. Tomlin at her apartment door.

Defendant first maintains that he was not properly advised of his right to a trial by jury and that his waiver thereof was made under coercion and without proper knowledge as to his rights.

While it is true that a jury trial can be waived only if it is understandingly made, People v. Fisher, 340 Ill. 250, nothing in the record here shows that defendant acted ignorantly or under coercion. The trial judge had a busy schedule and a jury trial would involve a great deal of time. Since the Four Term problem was not involved, the People could have waited until the vacationing judge returned before prosecuting defendant. Further, no reduction in defendant's bond was requested. He consequently had a free choice of waiting for a jury trial or of being tried by the court immediately. There is no question of coercion involved.

The record shows that defendant knowledgeably waived a jury trial. After a private conference with his counsel, the latter informed the court that defendant would waive a jury trial if his case could be tried immediately. The court thereupon advised defendant that he could have a jury trial if he wanted one and that, if found guilty by the jury, the court would then fix the punishment. Defendant promptly replied that he wished to waive a jury and executed a jury waiver. From the foregoing it is evident that defendant knew of his rights and knew

what he was doing when he executed the waiver.

The second matter raised by defendant, that of having been convicted on unbelievable testimony which raised a reasonable doubt as to his guilt, involves the question of credibility. The testimony of the witnesses on the material issues of this case is totally contradictory and cannot be reconciled. It was, consequently, the duty of the trial court as the trier of fact to determine the credibility of the witnesses and the weight to be given to their testimony; a reviewing court will not substitute its judgment for that of the trial court where the testimony conflicts, but will examine the evidence in the case and if it is so improbable or unsatisfactory as to raise a reasonable doubt as to the defendant's guilt, the conviction will be reversed. People v. Coulson, 13 Ill.2d 290; People v. Tensley, 3 Ill.2d 615; People v. Williams, 414 Ill. 414.

It cannot be said as a matter of law that the acts of defendant as testified to by Mrs. Lanier and Mrs. Tomlin, those of being seen at the home of the victim immediately after the incident and again the next day, are such that would create the impression that they are contrary to the laws of human nature. While any attempt to ascertain why the defendant would want to return to see the victim would be mere conjecture, the fact remains that there do exist many reasons for such actions which are not inconsistent with ordinary human behavior. Perhaps he wanted to insure that Mrs. Lanier would not go to the police. While this example is not given as the reason why he would want to return, the existence of such a plausible reason negates the possibility that such acts are contrary to the laws of human behavior. And this position is supported by the fact that defendant gave the name of "Clifford" to the victim's mother and the fact that he was arrested in the same area, in fact on the same block, as the incident occurred; if

he did not see fit to flee the area, it certainly does not seem so unreasonable that he would want to talk to the victim. Further, the fact that he knew Mrs. Lenier's name and address does not sound of improbability; it is a common occurrence in highly populated areas where one person knows the name and address of another, whereas that other person is completely unaware of that fact. On the whole, it cannot be said that the conditions testified to by Mrs. Lanier and Mrs. Tomlin are so improbable as to be inconsistent with defendant's guilt.

The cases cited by defendant in support of his position that the People's evidence is inherently improbable are distinguishable on their facts from the case at bar. They may be divided into three categories.

In the first group are the cases of People v. Coulson, 13 Ill.2d 290, and People v. Buchholz, 363 Ill. 270. In each case the reversal was based upon the unbelievable actions of the victim following the alleged crime. Further, the character and reputation of the victim was questioned by the reviewing court. In the Coulson case, the victim of the robbery was in jail at the time that he testified and had been drinking before the robbery. Also, the victim claimed that the defendant drove him home after the robbery to get some more money and that the defendant obligingly waited outside while the victim went into the house. In the Buchholz case, the court noted that the victim was indifferent when she testified to the lascivious acts committed in her presence by the defendant. Also, she failed to phone the police until 20 hours after the crime. In each case it was the actions of the victim that heavily influenced the court.

The closely scrutinized "sex cases" make up the second group. Indecent liberties with a child were the charges in People v. Williams, 414 Ill. 414, and People v. Hinton, 14 Ill.2d 424. The

competency of the complaining witness was questioned in the Hinton case. In the Williams case, there was no corroboration of the 13-year-old vindictive girl who was the victim. In the case of People v. O'Connor, 412 Ill. 304, the 23-year-old alleged rape victim drank with the defendant before and after the incident and failed to report the incident to police until eleven days later.

In the cases of People v. Botulinski, 383 Ill. 608, and People v. Magnafichi, 9 Ill.2d 169, the reviewing court believed the People's evidence but came to the conclusion that there was not enough evidence to convict. This is true also in the cases of People v. Fontana, 356 Ill. 461, and People v. Ware, 23 Ill.2d 59.

In the case at bar, however, none of the above situations present themselves.

Finally, there was ample corroboratory evidence in this case to warrant the trial judge's believing the People's evidence and disbelieving that of defendant and therefore to support a finding of guilty. Defendant testified that Sunday, April 2, was the first day that he had the gun in his possession. He further stated that Mrs. Lanier could not possibly have seen the gun before the time of the arrest because he did not see her on Sunday prior to that time. And yet, Mrs. Lanier gave Officer Santoro a very accurate description of the gun before the time of the arrest, to which the officer testified at trial. Not only did this corroborate the testimony of the prosecuting witness, but it also cast a very serious doubt on the credibility of defendant as a witness, and therefore on his entire story.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., and BRYANT, J., concur.

49792

(52 I.A.2405) 1 pt.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CRIMINAL COURT COOK COUNTY
v.	)	
JOHN ELTON JACKSON, Defendant-Appellant.	)	

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Criminal Court of Cook County, Illinois, where the appellant, on November 28, 1958, was found in a trial without jury to be guilty of the unlawful sale of narcotic drugs, and was sentenced to ten to fifteen years in the Illinois State Penitentiary. The appellant contends first, that his conviction was not proved beyond a reasonable doubt, and second, that a chemist's report was admitted at the trial contrary to the rules of evidence.

The facts of the case are as follows: the appellant, John Elton Jackson, was accused of selling narcotics to James S. Bailey, a federal narcotics agent. Bailey testified that he was introduced to the appellant at the Meadows Lounge on east 35th Street, Chicago, Illinois, on August 22, 1958, by Dennis Christian, a special employee of the federal government. Bailey further testified that on the same day he drove the appellant along with Christian to a corner on the south side of Chicago, where the appellant left the car and returned shortly thereafter with a package which he gave to Christian and which Christian immediately gave to Bailey. Bailey took $400.00 from his shirt pocket which he gave to Christian, and Christian gave the money to the appellant who then got out of the car. While this sale was taking place, Bailey was driving the car around the neighborhood.

Bailey then proceeded to a meeting with other agents where the package given him by Jackson was field tested. The test showed the contents of the package contained narcotics, and the package was

sent to the chemist's office for analysis.

The appellant, testifying on his own behalf said that Christian told him to take a package to his (Christian's) wife at 51st Street and the elevated, and that having done so, Christian sold the package to Bailey. He testified that he was paid $15.00 for delivering the package, but did not know what was in it. The appellant denies meeting the federal agent Bailey at the Meadows Lounge, and Bailey testified that he was never near the elevated platform during the night in question.

The third party, Dennis Christian,was not called upon to testify during the trial.

The appellant claims he cannot be convicted of this crime unless the State can bring in some other evidence to support federal agent Bailey's testimony. Otherwise, his argument states, "there is a definite lack of evidence to convict the defendant." The appellant then cites two cases where convictions were reversed on appeal because the complaining witness' testimony was uncorroborated, Keller v. People, 204 Ill. 604, 68 N.E. 512 (1903), People v. Freeman, 244 Ill. 590, 91 N.E. 708 (1910). The difficulty with these cases is that they deal with sex offenses against young girls thirteen and eight years of age, respectively. Clearly in those cases some corroboration is required. It has long been the general rule in Illinois that the testimony of one credible witness is enough to sustain a conviction. People v. Anthony, 28 Ill.2d 65, 190 N.E.2d 837 (1963). The Anthony case, similar on its facts to the present one, read at page 69:

> "It was not necessary that Parker be corroborated as to the details of the sale itself, as we have held that a conviction can be based upon the testimony of a single credible witness."

There was a similar holding in People v. Guido, 25 Ill.2d 204, 184 N.E.2d 858 (1962). There, as here, the appellant claimed that he

could not be convicted on the uncorroborated testimony of the federal narcotics agent. The Court said, at page 208:

> "We see no merit in this claim inasmuch as it has been repeatedly held that the testimony of a single witness, if it is positive and the witness credible, is sufficient to convict even though it is contradicted by the accused."

There was nothing so inherently improbable about the testimony given by federal agent Bailey that a court could not reasonably believe his testimony instead of that given by Jackson. The appellant has not shown the State did not prove its case beyond a reasonable doubt.

As a second ground for reversal the appellant claims that the chemist's report which stated that the contents of the package sold to Bailey by the appellant contained heroin, was improperly before the court. We quote from the record:

MR. WEBER: Q. Do you have the chemist's report? Will you stipulate to the chemist's list?

MR. KILROY: I don't know yet. Let's see what is on it.

MR. WEBER: Here.
(Handing document to counsel.)

MR. KILROY: Judge, I will admit the field test but I would like to see a better connection with what he is offering and the test as submitted by the chemist.

MR. WEBER: That would require my bringing in Agent Graf, which I can do.

MR. KILROY: Go ahead now. Proceed. We will thrash it out.

MR. WEBER: Then stipulated between the parties that People's Exhibit Number 1A was examined by Agent Fonner, who is a chemist and his qualifications would be admitted?

MR. KILROY: I know the gentleman, yes.

MR. WEBER: And that he inspected Exhibit Number 1A and found the above, found People's Exhibit 1A to be 21.2 per cent heroin, calculated as heroin hydrochloride monohydrate.

The appellant claims that the only thing his counsel stipulated to was that Agent Fonner was a qualified chemist. The State claims that the stipulation went to the contents of the report as well. From the conversation quoted above, it is difficult to know what appellant's counsel intended in his stipulation, but we are persuaded by the fact that he offered no objection to the assistant state's attorney reading the results of the report into the record. This indicates to us that he intended to stipulate to the fact that this is what the report contains. Moreover, since there was no objection to the introduction of the chemist's report into evidence at trial, the appellant cannot raise the question for the first time on appeal. People v. Polk, 19 Ill.2d 310, 167 N.E.2d 185 (1961), People v. Jones, 16 Ill.2d 569, 158 N.E.2d 773 (1959).

We find, therefore, that the appellant's claims on this appeal are without merit and the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

Gen. No. 64-51

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

(52 I.A.2 405) -2nd

OMA FRAZER,	:	
	:	
Plaintiff-Appellee,	:	APPEAL FROM THE
	:	
-vs-	:	CIRCUIT COURT OF
	:	
THOMAS A. FRAZER, SR.	:	RANDOLPH COUNTY
	:	
Defendant-Appellant.	:	

DOVE, P.J.

The complete abstract filed in this Court on June 30, 1964, by appellant, is as follows, omitting the title of the case:

ABSTRACT OF RECORD
INDEX TO RECORD

Rule 6 of this Court provides:

"The party prosecuting an appeal in this court shall furnish an abstract of the record on appeal, referring to the pages of the record by numerals on the margin. If the record contains the evidence it shall be condensed in narrative form so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit, i.e., Will, Trust Deed, Contract, and the like, and the page on which it may be found, and giving the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract need only be sufficient to present fully every error relied upon. Matters in the record on appeal not necessary for a full understanding of the questions presented for decision shall not be abstracted. Upon motion and good cause shown after the filing of the record on appeal, the court or a judge thereof in vacation may dispense with the furnishing of an abstract or with the abstracting of matters in the record, even though they

> are to be considered on appeal. The abstract will be taken to be accurate and sufficient unless the opposing party files an additional abstract, making necessary corrections or additions. The additional abstract may be filed without order of court."
>
> Rule 8 (1) - "Format of Abstracts and Briefs", provides that the names of attorneys filing any abstract or brief shall also appear at the conclusion thereof.

What this rule provides is that a party prosecuting an appeal to this Court shall present an abstract sufficient to present fully every error relied on for reversal. Everything necessary to decide the questions raised on appeal must appear in the abstract. The rule has been adopted to promote the work of the Court, and, since it has the force of law, failure to comply therewith warrants a court of review in affirming the judgment. (Thillens, Inc., vs. Dept. Financial Institutions, 24 Ill. 2d 110, 115).

In Spain v. Thomas, 49 Ill. App. 249, an index of the Record on Appeal will be found similar to the one in the instant case. The court said that it was misnamed an "Abstract of Record." "Under numerous decisions of Appellate Courts," said the court, (p. 250), "this index cannot be regarded as an Abstract of Record, and the judgment of the court below must be affirmed on the ground that no proper abstracts have been filed. See also Lake v. Lower, 30 Ill. App. 500; Allison v. Allison, 34 Ill. App. 385; Truby v. Case, 41 App. 153; Neilson v. Neilson, 29 App. 2 478; 173 N.E. 2 553; Belmont v. City of Chicago, 198 Ill. App. 25.

The abstract of the record is the pleading of appellant in a court of review, and the character of the case, the issue involved and what is sought to be reviewed, must be revealed from such pleading, and the substance of the record must be abstracted so that it will not be necessary for the court to resort to the record to determine the issues presented. The failure of the abstract to show the judgment entered by the trial court is itself a fatal defect, and appellant cannot sidestep the obligation of filing a sufficient abstract because the rules permit appellee to file an additional abstract. The initial responsibility of an appellant never shifts to the appellee; the latter is never compelled to do that which the former should hav done. (Richman Chemical Co. v. Lowenthal, 16 Ill. App. 2, 568, 149 N.E. 2 351; Thillens Inc. v. Dept. Financial Institutions, 24 Ill. 110, 115; Gribben v. Interstate Motor Freight System Co., 38 Ill. App. 2d 123, 186 N.E. 2d 100; Crooks v. Sayles, 39 Ill. App. 2d 22, 30, 187 N.E. 2d 742, 746).

Under these and many other authorities, the only appropriate order to enter in this case is to affirm the judgment of the Circuit Court of Randolph County.

Judgment Affirmed.

Reynolds, J., concurs.

Wright, J., concurs.

Publish in Abstract only.

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

Gen. No. 10556

JAMES E. MCGINTY, JR.,
Plaintiff-Appellant,

vs.

SKOOG CONSTRUCTION COMPANY, a Delaware Corporation, and THE NATIONAL COUNCIL OF TEACHERS OF ENGLISH, a Not-for-Profit Corporation,
Defendants-Appellees.

Appeal from the Circuit Court for the Sixth Judicial Circuit - Champaign County.

CROW, P. J.

This is a suit by the plaintiff, James E. McGinty, Jr., against the defendants, Skoog Construction Company, and The National Council of Teachers of English, for an injunction to prevent the alleged violation of a Zoning Ordinance of the City of Champaign. The defendants' challenge to the sufficiency of the amended complaint, by motions to dismiss, was upheld by the Trial Court, a final judgment dismissing the amended complaint was entered, and the plaintiff appeals. The cause is submitted on the pleadings, consisting of the amended complaint and the motions to dismiss.

The amended complaint alleges, in substance, that: (1) the plaintiff owns certain real estate, 501 South Sixth Street, Champaign, which is in the same contiguous zoning district as the

building to be located on the property thereinafter described; (2) the defendant The National Council of Teachers of English owns certain real estate, (also in Champaign), and the plaintiff is informed and believes that defendant has contracted for the Skoog Construction Company (the other defendant) to erect a masonry office building thereon; (3) in connection with the construction of such office building the defendants applied for a building permit to the Superintendent of Building Inspection for Champaign, in which application they indicated that a three story building and basement would be constructed, a permit was issued for 503 South Sixth Street, Champaign, showing a certain frontage, depth, and height for the building, under R-4 Zoning, and A. Edward Skoog, as agent for the defendant The National Council etc. agreed therein to do the work in accordance with the description above set forth, and according to the ordinances of the City and Laws of the State, and that the facts stated are true; (4) the building which the defendants propose to construct is immediately south of the real estate owned by the plaintiff, and the plaintiff in constructing his building was required to and did provide off-street parking in accordance with applicable zoning ordinances for an office building; (5) when the defendant The National Council etc. purchased its real estate there was in effect a zoning ordinance in Champaign, by reference made a part of the amended complaint, which placed such real estate in an R-4 classification, the permitted uses include an office, and the off-street parking requirements under the ordinance are: "OFFICE: One space, on

the lot or within 300 feet thereof, for each 200 square feet of enclosed floor area devoted to that use, excluding hallways, stairways, restrooms, maintenance areas, and other comparable areas."; (6) the plans for the construction of the building by the defendants on file with the Superintendent of Building Inspection of Champaign provide for approximately 7000 square feet of enclosed floor area of which at least 5200 square feet would be devoted to office use, which would mean the off-street parking requirement would be at least 26 parking spaces, and the plans provide for only 7 off-street parking spaces; (7) construction was started on (the defendants') building October 7, 1963, was halted at the plaintiff's request October 10th, and was subsequently resumed at about the time the original complaint herein was filed; (8) the plaintiff purchased his real estate relying on the zoning of the area as R-4, and constructed his office building conforming to the requirements of R-4 as to parking area, and the defendants' construction of an office building next to plaintiff's without providing parking in conformance to the R-4 zoning requirements of the ordinance and in violation of the zoning laws will cause irreparable damage to the plaintiff as it would depreciate the value of his property, and to the plaintiff and the City as it will cause congestion in the public streets, and will be injurious to public health, safety, comfort, and welfare, and will change the development of the neighborhood so that the taxable value of land and buildings throughout the community will not be conserved; (9) the plaintiff is informed and believes that the defendants are constructing a building which

is not actually an office building but is primarily a warehouse, and a warehouse in the R-4 zone is not authorized by the zoning ordinance, and will cause irreparable damage to the plaintiff as it would depreciate the value of his property and would change the development of the neighborhood so that the taxable value of land and buildings throughout the municipality would not be conserved; and (10) the plaintiff has no relief except in a court of equity and the action is brought pursuant to CH. 24 ILL. REV. STATS., 1961, Sec. 11-13-15. The prayer of the amended complaint is for an injunction against construction of the building according to the plans now on file, and against any construction or use except in accord with the City Ordinances, and for an allowance for plaintiff's attorneys' fees.

The plaintiff argues that: (1) the issuance of an unauthorized permit to the defendants conferred no rights upon them; (2) there is no legal requirement that the plaintiff "exhaust his administrative remedies" before bringing this action; (3) the purchaser of property subject to a general zoning ordinance has the right to rely upon the rule of law that the zoning will not be changed unless the change is required for the public good; (4) the plaintiff is a qualified person to bring this suit; and (5) the defendants have no basis for urging estoppel.

The defendant-appellee The National Council of Teachers of English urges that (1) the amended complaint does not show the plaintiff has exercised, let alone exhausted, his local administrative remedies; (2) it fails to state necessary facts to justify

the conclusions therein; and (3) it is insufficient to support the relief sought because of ambiguous and alternative theories and because there was no showing of actual and substantial injury to the plaintiff. There is no brief here by the other defendant-appellee.

CH. 24 ILL. REV. STATS., 1961, par. 11-13-15, being a part of Division 13, Zoning, of the Illinois Municipal Code of 1961, as amended, empowering the corporate authorities in each municipality with respect to zoning, etc., provides so far as material:

> "In case any building or structure is constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this Division 13, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. * * * * *
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> In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes of this Division 13. * * * * * *

Does the amended complaint, as a matter of pleading, state a case for injunctive relief, in accordance with the general rules of equity pleading, under this statute to the effect that a "build-

ing or structure is constructed, * * or maintained, or any building, structure, or land is used in violation of this Division 13, or of any ordinance or other regulation made under the authority conferred thereby"? There is no allegation of any alleged violation of Division 13 of the statute itself. No copy of the alleged Zoning Ordinance of the City of Champaign, or its alleged relevant parts, is attached as an exhibit to the amended complaint. The only specific allegedly relevant part of the Zoning Ordinance recited in the amended complaint is the alleged provision relating to off-street parking facilities for offices in paragraph 5 of the amended complaint, which we've set out above in summarizing the amended complaint. The allegation in paragraph 9 of the Amended Complaint, on information and belief, that the defendants are constructing a building which is not actually an office building but is primarily a warehouse and a warehouse in the R-4 zone is not authorized by the zoning ordinance is not supported by any copy of the Zoning Ordinance, or its alleged relevant parts, as an exhibit, and no specific alleged relevant part of the Ordinance is recited in paragraph 9.

Under Sections 33 and 36 of the Civil Practice Act, CH. 110 ILL. REV. STATS., 1963, pars. 33, 36, all pleadings shall contain a plain and concise statement of the pleader's cause of action, and if a claim is founded upon a written instrument a copy thereof, or of so much of the same as is relevant, must be attached to the

pleading as an exhibit or recited therein. The general rules of equity pleading apply in injunction suits, but the requirements of definiteness and certainty as to the essential facts apply with peculiar force and strictness where the relief sought is injunction; the extraordinary character of the injunctive remedy requires that it be awarded only where the complaint shows on its face a clear right to the relief; the facts relied upon to establish such right must be alleged positively and with certainty and precision, not mere opinions and conclusions: STENZEL et al. v. YATES et al. (1951) 342 Ill. App. 435. Our Courts of review have repeatedly emphasized the need for great caution in granting orders for injunctions; repeated allegations on information and belief that certain events occurred, without any supporting facts, are conclusions: HOPE etc. v. HOPE et al. (1953) 350 Ill. App. 190. As a general rule an allegation of facts upon which an injunction may be ordered, must be stated positively, although where certain facts are charged to rest in the knowledge of the defendant, or must of necessity be within his knowledge and not the plaintiff's, they may be stated on information and belief, followed by the statement that the complainant charges the facts to be true: GREENBERG v. HOLMES (1902) 100 Ill. App. 186. The essential facts relied upon for relief by injunction must be stated with sufficient certainty to negative every reasonable inference arising upon the facts stated from which inference it might be said that the complainant is not entitled to the relief sought: GATES et al. v. SWEITZER et al.

entitled to the relief sought; [illegible] from which inference it may be said that the complainant is guilty [illegible] active early remedies [illegible] lief by injunction may be accorded [illegible] (1900) 100 Ill. App. 138. [illegible] the complainant charged the [illegible] be stated on information and belief, [illegible] are charged to [illegible] necessarily [illegible] ordered, must be stated [illegible] several rule as allegation of [illegible] sional [illegible] [illegible] used, although [illegible] emphasized the [illegible] functions; [illegible] not [illegible] clear right [illegible] right must be [illegible] shall be awarded [illegible] tion; the ordinary [illegible] pecuniary [illegible] definiteness and [illegible] equity pleading [illegible] pleading as an exhibit or [illegible]

(1932) 347 Ill. 353; HOPE etc. v. HOPE et al., supra. Equity will not entertain jurisdiction and issue an injunction unless the complainant shows that he will be injured if relief is not granted, and the allegations must be clear and distinct that substantial injury will be sustained: LIBERTY NATIONAL BANK etc. v. METRICK et al. (1952) 347 Ill. App. 400; to entitle one to injunctive relief he must establish, as against the defendant, an actual and substantial injury and not merely a technical inconsequential wrong entitling him to nominal damages only, - it must clearly appear that some act has been done or is threatened against the plaintiff which will produce an irreparable injury to him: HAACK et al. v. LINDSAY LIGHT AND CHEMICAL CO. (1946) 393 Ill. 367. An allegation simply that the plaintiff will suffer irreparable damage, or irreparable injury, is a mere conclusion and not sufficient: STENZEL et al. v. YATES et al., supra; LIBERTY NATIONAL BANK etc. v. METRICK et al., supra. The statute referred to, CH. 24 ILL. REV. STATS., 1961, par. 11-13 -15, does not purport to limit a chancellor in applying equitable principles to the facts of the case: 222 East Chestnut Street Corp. v. LaSalle National Bank etc., et al. (1957) 15 Ill. App. (2) 460, appeal denied, 20 Ill. App. (2) V.

So far as any alleged "violation" of any alleged Zoning Ordinance of Champaign is concerned, the only specific provision of the alleged ordinance recited in the amended complaint is that relating to off-street parking facilities required for offices, namely, "one space, on the lot or within 300 feet thereof, for each 200

square feet of enclosed floor area devoted to that use", and the substance of the plaintiff's relevant allegations are that he owns 501 South Sixth Street, Champaign, the defendant The National Council etc. owns 503 South Sixth Street, immediately south, the plaintiff is informed and believes the defendant The National Council etc. has contracted for the other defendant Skoog etc. to erect a masonry office building thereon, in connection with the construction of such office building the defendants applied for a building permit, a permit was issued, the defendants agreed therein to do the work in accordance with the foregoing description and according to ordinances and laws, the plans on file provide for at least 5200 square feet devoted to office use, the off-street parking requirement would be at least 26 parking spaces, and the plans provide for only 7 off-street parking spaces. The provision of the alleged Zoning Ordinance recited in the amended complaint does not require that the indicated necessary parking spaces be exclusively on the lot in question but that they be "on the lot or within 300 feet thereof." The amended complaint does not allege the defendant The National Council etc. has failed to provide the indicated necessary parking spaces on the lot or within 300 feet thereof, and hence does not allege a violation of that recited provision. It is a reasonable inference from the facts stated in the amended complaint that the defendant The National Council etc. is providing the indicated necessary parking spaces either on the lot or within 300 feet thereof, - the defendants agreed in obtaining the building permit to do the work in accordance with the description and accord-

permit to do the work in accordance with the description and accord-
300 feet thereof, - the defendants agree in defraying the portion
the indicated necessary parking spaces either on the lot in which
complaint that the duly adopted National Council etc. is provid-
is a reasonable interest from the legal point of view to assume
nance does not allege a violation of that fact as provided.
sary parking spaces on the lot or in the vicinity, as the
the National Council etc. has failed to provide the necessary
fect thereof." The defendants further say that the defend-
on the lot in question was that they were not able for
required that the indicated necessary parking spaces be contiguously
alleged Zoning Ordinance requires the erection of the
provide for only 7 air-space parking spaces. The provision of the
ing requirement would be at least 16 parking spaces, and the plans
accordingly by ordinances and laws, the petitioner has a
to do the work in accordance with the ordinance, therefore, in a
nature) permit," a permit was issued, the validity of which
construction of such building in which the ordinance applied for a
to erect a masonry office building of stone, brick and concrete
Council etc. has secured the use of adjoining property etc.
plaintiff is injured by believing the defendants the National
Council etc. owns 501 South Burnett Street, immediately south, the
owns 501 South Burnett Street, the defendants the National
subsurface of the plaintiff's property adjoining and west the
square feet of enclosed floor area devoted to retail use, and the

ing to ordinances and laws, as the amended complaint says, - and the amended complaint does not negative that inference, and from that inference it may be said the plaintiff is not entitled to the relief sought.

Nor do the allegations of paragraph 9 of the amended complaint, - that the plaintiff is informed and believes the defendants are constructing a building which is not actually an office building but is primarily a warehouse, and a warehouse in the R-4 zone is not authorized by the Zoning Ordinance, - properly allege a "violation" of any alleged Zoning Ordinance of Champaign. No copy of the Zoning Ordinance, or its alleged relevant parts is attached as an exhibit. No alleged relevant part of the ordinance is recited therein. The facts are not alleged positively and with certainty and precision, the allegations on information and belief without supporting facts are conclusions, if alleging on information and belief were permissible the allegations are not followed by a statement that the plaintiff charges the facts to be true, the allegations are ambiguous, confusing, and vague, though paragraph 9 would appear to be an effort to state a separate claim or cause of action upon which a separate recovery might be had it is not stated in a separate count: CH. 110 ILL. REV. STATS., 1963, par. 33, and though the plaintiff appears to be in doubt as to which of two statements of fact is true he does not state paragraph 9 in the alternative: CH. 110 ILL. REV. STATS., 1963, par. 43.

Further, the allegations, par. 8, that the defendants' construction of an office building next to plaintiff's without providing parking in conformance to the R-4 zoning requirements of the

ing parking in conformance to the N-W zoning requirements of the construction of an office building next to plaintiff's [illegible] number, the allegations, par. 4, that the defendant's [illegible] fact is true he does not state paragraphs [illegible] plaintiff appears to be [illegible] which a separate recovery might be had [illegible] ate counts: CH. 110 Ill. REV. STATS., 72, par. 4.

CH. 110 Ill. REV. STATS., 72, par. 4.

- that the plaintiff is [illegible] [illegible] structing a building [illegible] is primarily a matter [illegible] authorized by the Zoning [illegible] of any alleged Zoning Ordinance or [illegible] ing Ordinance, or are [illegible] might. No [illegible] relevant [illegible] in. The facts are not alleged positively [illegible] precision, the allegations [illegible] porting facts are conclusions, [illegible] were permissible the allegations [illegible] that the plaintiff charges [illegible] are ambiguous, conclusions, [illegible] to be an effort to state a [illegible] which a separate recovery might be had [illegible] ate counts: CH. 110 Ill. REV. STATS., 72, par. 4.

ordinance and in violation of the zoning laws will cause irreparable damage to the plaintiff as it would depreciate the value of his property, cause congestion in the public streets, be injurious to public health, safety, comfort, and welfare, and will change the development of the neighborhood so that the taxable value of land and buildings throughout the community will not be conserved, and, par. 9, (a warehouse) will cause irreparable damage to the plaintiff, etc. are not clear and distinct that actual and substantial irreparable injury will be sustained by the plaintiff if relief is not granted, but are mere conclusions and not sufficient.

The amended complaint does not contain a plain and concise statement of the pleader's cause of action, though founded in large part upon a written instrument no copy thereof or of so much as is relevant is attached as an exhibit and only one portion thereof is recited therein, it does not show on its face a clear right to the relief sought, the essential facts relied upon are not alleged positively and with certainty and precision, some of the allegations on information and belief are without supporting facts and are conclusions, to whatever extent alleging upon information and belief may be appropriate such allegations are not followed by a statement that the plaintiff charges the facts to be true, the essential facts are not stated with sufficient certainty to negative every reasonable inference arising upon the facts stated from which inference it might be said the plaintiff is not entitled to the relief

sought, and it does not clearly and distinctly show that actual, substantial, irreparable injury will be sustained by the plaintiff if relief is not granted. It does not state equitable grounds for injunctive relief. It is not necessary to consider other points raised.

The judgment is correct, and will be affirmed.

A F F I R M E D .

SPIVEY and SMITH, JJ., concur.